

216346

**BEFORE  
THE PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA  
DOCKET NO. 2008-360-S**

RECEIVED  
PUBLIC SERVICE  
COMMISSION

IN RE: )  
Happy Rabbit, LP on Behalf of, )  
Windridge Townhomes, )  
 )  
Complainant, )  
v. )  
 )  
Alpine Utilities, Inc., )  
Respondent. )  
\_\_\_\_\_ )

**COMPLAINANT'S REPLY TO RESPONSE  
TO MOTION TO AMEND  
COMPLAINT**

**INTRODUCTION**

Happy Rabbit, a South Carolina Limited Partnership, on behalf of Windridge Townhomes, (hereinafter, "Happy Rabbit") filed a Complaint in this Docket on September 16, 2008. Thereafter, extensive discovery has been completed by the parties. As a result of discovery, served by Complainant Happy Rabbit, and answers thereto by Alpine Utilities, Inc., (hereinafter, "Alpine"), Alpine has admitted that actual notice of Section 27-33-50, S.C Code of Laws Ann. (1976, as amended), was provided to Alpine by Happy Rabbit, on or about October 6, 2003. Alpine thereafter willfully overcharged Happy Rabbit, despite being placed on notice of Section 27-33-50, and despite Happy Rabbit's request that Alpine establish sewer utility accounts with each tenant of Happy Rabbit, as required by Section 27-33-50. Happy Rabbit filed a Motion to Conform to Proof on March 11, 2009. Alpine filed a Response to Happy Rabbit's Motion on March 20, 2009. Happy Rabbit filed a Reply to Alpine's Response to Happy Rabbit's Motion to Conform to Proof on April 6, 2009. Thereafter, Happy Rabbit Filed a Motion to Amend Complaint, pursuant to Rule 15(a) of the S.C. Rules of Civil Procedure on April 6, 2009. Thereafter, Alpine filed a Response. Happy Rabbit's Reply to Alpine's Response follows:

**INTRODUCTION**

Happy Rabbit's Reply to Alpine's Response, reiterates and re-alleges all of its earlier arguments in all earlier filings in this Docket and uses the same number headings as Alpine's Pleading and Happy Rabbit replies *seriatim*:

**ORIGINAL**

## **I. MOTION TO AMEND COMPLAINT WOULD NOT PREJUDICE ALPINE**

Alpine's discussion on this topic in its Response document is irrelevant<sup>1</sup>. Despite Alpine's lengthy response, there is a "bright line" rule on amendments under Rule 15 (a) South Carolina Rules of Civil Procedure, (hereinafter, "SCRCP").

Alpine makes an unsupported claim for prejudice in this matter, but South Carolina's Courts have given us clear guidance as to what "prejudice" means in the context of Rule 15 (a) SCRCP. **The prejudice envisioned by Rule 15(a) is simply a lack of notice that the new issue is to be tried and a lack of opportunity to refute it.** (Emphasis supplied) Stanley v. Kirkpatrick, 357 S.C. 169, 174, 592 S.E.2d 296, 298 (2003).

**In the instant case, there is no prejudice because there is no lack of notice and there is no lack of opportunity to refute the amendment, because no hearing has been scheduled in this Docket.** Alpine's counsel can reargue this point again and again, but nothing can change the fact that prejudice is clearly defined under South Carolina Law and there cannot be any prejudice with notice and an opportunity to refute an allegation. Therefore, Alpine's definition of prejudice does not apply, and applying the correct definition of prejudice to this case shows that Alpine will not be prejudiced by this Commission's granting Happy Rabbit's Motion to Amend.

## **II. HAPPY RABBIT HAS BEEN "WILLFULLY OVERCHARGED"**

Alpine apparently believes its *ipse dixit* allegation that it did not overcharge Happy Rabbit should end this inquiry. Obviously this Commission after hearing this matter, will decide if Happy Rabbit and also Mrs. Carolyn L. Cook were overcharged pursuant to Commission Regulation R. 103-533.3, in light of § 27-33-50 S.C. Code Ann. (1976, as amended).

---

<sup>1</sup> Rule 15(a) of the South Carolina Rules of Civil Procedure allows amendments to Pleadings and such amendments are within the sound discretion of this Commission. Kelly v. S.C. Farm Bureau Mut. Ins. Co., 316 S.C. 319, 323, 450 S.E.2d 59, 61 (Ct. App. 1994). Also, because leave may be freely given when justice requires, a Court's decision allowing amendment will rarely be disturbed on appeal. City of North Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 232-33, 599 S.E.2d 462, 465 (Ct. App. 2004). Furthermore, amendment should be freely given by leave of court, when justice requires and the amendment does not prejudice other parties. Griffith v. Griffith, 332 S.C. 630, 506 S.E.2d 526, 529 (Ct. App. 1998). Rule 15(a), strongly favors amendments and the Court is encouraged to freely grant leave to amend. Jarrell v. Seaboard Systems R.R., Inc., 294 S.C. 183, 186, 363 S.E.2d 398, 399 (Ct. App. 1987). The test for such amendment is prejudice to the other party, even if objected to by the other party. The prejudice envisioned by Rule 15(a) is simply a lack of notice that the new issue is to be tried and a lack of opportunity to refute it. Stanley v. Kirkpatrick, 357 S.C. 169, 174, 592 S.E.2d 296, 298 (2003).

Alpine repeats its erroneous argument that because the charges to Happy Rabbit were made pursuant to an approved schedule, that fact overrides Alpine's violation of a state statute, § 27-33-50 S.C. Code Ann. (1976, as amended). Alpine's reliance on an argument that Alpine's willful overcharge was sanctioned, by the fact that the willful overcharges were made pursuant to a Commission approved schedule, is incorrect. This Commission has unlimited authority to reduce or correct a rate, regardless of the fact that charges were made pursuant to an approved rate schedule. Porter v. South Carolina Public Service Com'n, 493 S.E.2<sup>nd</sup> 92 (S.C. 1997); Also see § 58-5-290; Also see R. 103-533.3.

Specifically, whenever the Commission shall find, after hearing, that the **rates...charges... however or whensoever they shall have theretofore been fixed or established, demanded,...charged or collected by any public utility for any service,...that the rules,...affecting such rates...charges...are...or in anywise in violation of any provision of law**, the Commission shall,...determine the just and reasonable... charges...or practices to be thereafter observed and enforced and [this Commission] **shall fix them by Order as herein provided** (emphasis supplied) See § 58-5-290 S.C. Code Ann. (1976, as amended).

Therefore, in recognition of the Statute, Regulation, and Case Law cited, the fact that Alpine willfully overcharged Happy Rabbit pursuant to a Commission approved schedule does not absolve Alpine of the willful overcharge in light of § 27-33-50 S.C. Code Ann. (1976, as amended).

Alpine has repeatedly made reference to statements made by Happy Rabbit in Circuit Court or earlier in this proceeding. No matter how many times Alpine repeats these statements, they are not dispositive.

Alpine's argument is misleading in its implication that Happy Rabbit's early reference that this Commission may not award monetary damages is of some import in this Docket, it is not. **It is true that this Commission may not award monetary damages, however, this Commission has express authority to require refunds of willful overcharges, in light of Alpine's violations of R. 103-533.3.**

Therefore, quotes from Happy Rabbit early in this Docket and references to Happy Rabbit's position in the Circuit Court, are irrelevant. Happy Rabbit's two pending Motions

seeking recovery of willful overcharges, as a result of Alpine's admissions, both actual and *de facto*, explain Happy Rabbit's earlier statements.

Alpine attempts to posture this Docket as not having any pending request by Happy Rabbit's to recover willful overcharges, is simply incorrect, in light of Happy Rabbit's two pending Motions to amend to specifically recover willful overcharges from Alpine.

### **III. THE RELIEF REQUESTED WOULD NOT RESULT IN A WINDFALL**

Alpine has repeatedly made this argument. Once again their argument is not supported by case law and not supported by any statute, and Alpine does not provide a citation to any authority to support its argument. Alpine can hardly be heard to complain that Alpine's refusal to comply with § 27-33-50, in recognition of this Commission's Regulation, R. 105-533.3, since July 1, 2002, would lead to a result of which Alpine disapproves.

### **IV. THIS COMMISSION HAS JURISDICTION**

This Commission has broad and overwhelming jurisdiction to hear customer Complaints. "...by petition in writing, setting forth any act or thing done, or admitted to being done, with respect to which, under the provisions of Art. 1, 3, and 5 of this Chapter, **the Commission has jurisdiction or is alleged to have jurisdiction.**" (Emphasis supplied) See § 58-5-270.

Mrs. Cook has alleged that this Commission has jurisdiction to hear this Complaint, which is all that is required by § 58-5-270. "...**the Commission has jurisdiction or is alleged to have jurisdiction.**"

Additionally, Mrs. Cook and Happy Rabbit's Complaints should be heard by this Commission because this Commission has express authority to hear them pursuant to § 58-3-140, § 58-5-10, § 58-5-210, § 58-5-270, § 58-5-290, and § 58-5-300.

South Carolina case law provides very strong support for the broad jurisdiction of this Commission. See the two cases cited by Alpine's counsel in previous filings before this Commission: Kiawah Property Owners Group v. Public Serv. Comm'n of S.C., 359 S.C. 105, 109, 597 S.E.2d 145, 147 (2004) ("The PSC is a government agency of limited power and jurisdiction, which is **conferred either expressly or impliedly by the General Assembly.**") (emphasis added); City of Camden v. Public Service Comm'n of S.C., 283 S.C. 380, 382, 323

S.E.2d 519, 521 (1984) ("The Public Service Commission is a governmental body of limited power and jurisdiction, and has only such powers as are **conferred upon it either expressly or by reasonably necessary implication by the General Assembly.**") (Emphasis added)

The following cases are especially pertinent to this case, "The duty to fix a reasonable rate for a service performed by a public utility rests solely with the Public Service Commission and **cannot be delegated by the Commission to the courts.**" (Emphasis added) Carolina Water Service, Inc. v. South Carolina Public Service Commission, 248 S.E.2<sup>nd</sup> 924 (S.C. 1978). "Under statute governing Public Service Commission correction of improper utility rates, [§ 58-5-290] Commission has continuing power to prospectively correct or reduce previously approved charge." Porter v. South Carolina Public Service Com'n, *supra*. After a hearing under § 58-5-290, reference would be made to R. 103-533.3 for the willful overcharge allegation.

Mrs. Cook and Happy Rabbit, are both entitled to maintain an action before this Commission and the Circuit Court. South Carolina Courts have held that this Commission has sole authority to declare the proper utility customer relationship between the Complainants and Alpine and sole authority to adjudicate a Complaint of willful overcharge under a Commission Regulation. Carolina Water Service, Inc. v. South Carolina Public Service Commission, *supra*. There is an applicable three-year statute of limitations in the Circuit Court, but no such limitation applies under the willful overcharge regulation of this Commission. Furthermore, the action in the Circuit Court seeks money damages for unfair trade practices, plus attorney's fees, which remedies are not available before the Commission.

#### **V. STATUTE OF LIMITATIONS DOES NOT APPLY**

As Alpine well knows, the Commission's willful overcharge Regulation R. 103-533.3 does not contain a statute of limitations restriction. Furthermore, Alpine's continuous and monthly violation of § 27-33-50, activates a new statute of limitation equal to thirty-six months from their continuous and monthly violation of the statute (i.e. their violation of § 27-33-50 this month – April 2009, can be recovered back thirty-six months from April of 2009).

Happy Rabbit's Pleading in Circuit Court acknowledges that its recovery under § 27-33-50 should be limited to thirty-six months from the **date of its filing in Circuit Court**. As stated, this Commission has no statute limitation restriction in its willful overcharge regulation. Also as

has been stated repeatedly by Happy Rabbit, Happy Rabbit is not seeking a money damages recovery from this Commission pursuant to § 27-33-50. Alpine continues, on a monthly basis and currently, to violate § 27-33-50, since the date of enactment of the statute on July 1, 2002. That continuous and monthly violation of § 27-33-50, as does a new violation of any state statute, activates a new statute of limitations period and compels this Commission's inquiry under its willful overcharge Regulations R. 103-533.3.

For Alpine's argument to be valid, an individual could violate a state statute everyday since July 1, 2002, and then argue to the state of South Carolina that it could only enforce violations of the state statute back three years.

**The only way Alpine's argument would apply, is if Alpine had violated the state statute once, and three years had elapsed since the date of that single violation by Alpine.**

That is not the fact situation in the instant case, as Alpine has continued to violate the statute, § 27-33-50, each and every month from July 1, 2002, until April of 2009.

Accordingly, Alpine's dissertation on the statute of limitations in the State of South Carolina is not helpful, nor dispositive.

#### **VI. DOCTRINE OF LACHES DOES NOT APPLY**

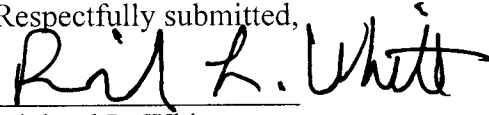
The Doctrine of Laches is an equitable doctrine, not applicable to a continuous monthly violation of a state statute. § 27-33-50, as in the instant case. (See discussion hereinabove in "Section V".)

Once again, laches could be argued as to a single violation more than three years from the date of Mrs. Cook and Happy Rabbit's filing of their Complaint against Alpine with this Commission. Because Alpine has continued to violate the statute, § 27-33-50, each and every month from July 1, 2002, until April of 2009, laches does not apply to Mrs. Cook's and Happy Rabbit's Complaints.

**CONCLUSION**

Based on the foregoing and the Pleadings in this case, Happy Rabbit should be granted leave from the Court to amend its Complaint.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard L. Whitt", written over a horizontal line.

Richard L. Whitt

Jefferson D. Griffith, III

Counsel of Record for

Happy Rabbit, a South Carolina Limited

Partnership and

Carolyn L. Cook

Columbia, South Carolina

RLW/jjy

BEFORE  
THE PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA  
DOCKET NO. 2008-360-S

SC PUBLIC SERVICE  
COMMISSION  
APR 17 2:49 PM

IN RE:

Happy Rabbit, LP on Behalf of,  
Windridge Townhomes,  
  
Complainant,  
v.  
Alpine Utilities, Inc.,  
Respondent

CERTIFICATE OF SERVICE


RECEIVED  
2009 APR 17 PM 2:49  
SC PUBLIC SERVICE  
COMMISSION

I, Jessica Yun, an employee of Austin & Rogers, P.A., certify that I caused to be delivered a copy of Happy Rabbit's Hearing Request Pursuant to § 58-5-270, S.C. Code Ann. (1976, as amended) in this Docket and Carolyn L. Cook's Complaint and Happy Rabbit's Reply to Alpine Utility Inc.'s Response to Happy Rabbit's Motion to Amend Complaint, in the above referenced matter as indicated below, via Hand Delivery as addressed below, or e-mail on April 17, 2009.

Attorney Benjamin P. Mustian  
930 Richland Street  
Columbia S.C., 29201  
**Via Hand-Delivery**

Nanette S. Edwards, Esquire  
**Via e-mail**

Austin & Rogers, P.A.

  
Jessica Yun

Columbia, South Carolina  
April 17, 2009

**ORIGINAL**